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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

Nos. 759, 760, 781, 782, 811

THE UNITED STATES OF AMERICA,
Petitioner-Respondent

v.

UNITED MINE WORKERS OF AMERICA, AN UNINCORPORATED ASSOCIATION, AND JOHN L. LEWIS, INDIVIDUALLY AND AS PRESIDENT OF THE UNITED MINE WORKERS OF AMERICA,
Respondents-Petitioners

APPLICATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE ON BEHALF OF THE CONGRESS OF INDUSTRIAL ORGANIZATIONS.

LEE PRESSMAN,
General Counsel,
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Congress of Industrial Organizations.

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APPLICATION FOR LEAVE TO FILE BRIEF

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Congress of Industrial Organizations prays for leave to file a brief as amicus curiae in the above-entitled cases. The applicant has filed with the clerk the written consent of counsel for the United Mine Workers and John L. Lewis, and has also filed a letter from counsel for the government advising that "the United States interposes no objection to the filing of such brief", "provided that the Court is agreeable to that action." The applicant believes that this letter is sufficient to meet Rule 27(9) of the Court, but makes this application in the event it is mistaken.

INTEREST OF PARTIES FILING THIS BRIEF

Issues of law raised by the instant case are of the most profound significance to the future of the labor movement in

this country. We believe for reasons fully stated in the accompanying brief that the decision below constitutes a critical departure from federal labor policy. We believe that the entire proceeding below rests upon a serious misinterpretation of the Clayton and Norris-LaGuardia Acts and of the court's powers under present federal policy in connection with labor disputes. For these reasons, and because of the importance of these cases as precedents, the Congress of Industrial Organizations requests leave to file a brief as amicus curiae.

BRIEF

On November 18, 1946, the court below issued a restraining order in the instant case. Thereafter on November 21, 1946, the District Court issued a rule to show cause why defendants should not be punished for contempt of court, and on December 3, 1946, after trial on the issues raised by the rule to show cause, the court below found the United Mine Workers of America and John L. Lewis, individually, guilty of both civil and criminal contempt. On December 4, 1946, fines were imposed of $3,500,000 on the labor organization defendant and $10,000 on John L. Lewis. On the same day, December 4, the court below issued a temporary injunction imposing the same restraints contained in the original temporary restraining order.

It was the contention of the Government, a contention adopted by the court below, that neither the Norris-LaGuardia Act nor the Clayton Act applies to the instant case and that even if these statutes did apply they would not prevent the punishment for contempt.

I. THE CLAYTON ACT AND THE NORRIS-LaGUARDIA ACT PLAINLY APPLY TO THIS PROCEEDING.

A. This proceeding exhibits all of the evils of "government by injunction" to which the Clayton and Norris-LaGuardia Acts were addressed. Included within those evils was the resort to injunctions by the Executive to crush national strikes.

From about 1893 until the passage of the Norris-LaGuardia Act in 1932, there developed in this country a pattern in con-

nection with the use of the labor injunction in industrial disputes.

This pattern[1] exhibited certain fixed and identifiable characteristics:

1. Initially injunctions were sought in labor matters as ancillary proceedings to receiverships. Because the proceeding was originally in *gremio legis* it was a relatively simple matter for a chancellor to issue injunctions ostensibly for the purpose of protecting the subject matter of the legal proceeding.

2. Restraints were issued by judges *ex parte*, without notice and hearing.

3. Proof was made by affidavit.

4. Because of the highly fluid character of labor disputes the delay involved in testing even a temporary order in itself severely injured the exercise by workers of the right to strike and picket. The device of preserving the *status quo* in effect served to neutralize the exercise by workers of basic rights.

5. On the basis of such proof by affidavit injunctions were issued against large groups of unnamed individuals.

6. These orders embodied not only negative restraints but mandatory commands as well.

7. The scope of the injunction frequently was such as to embrace prohibitions upon free speech and upon the act of striking itself.

8. The restraints were freely issued and in many instances embodied the partisan phraseology of counsel.

9. Punishment for contempt was freely imposed by the same judge who issued the injunction or order.

10. The punishments involved were in most cases quite arbitrary and wholly unrelated either to the civil or criminal contempts alleged.

11. The effect of this process was to deny a single group of our people, namely, workers and their leaders, the right to trial by jury in connection with criminal proceedings.

12. So great and arbitrary were the punishments as to con-

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[1] It is most fully described in Frankfurter and Greene, THE LABOR INJUNCTION (New York, 1930) See also Witte, THE GOVERNMENT IN LABOR DISPUTES (New York, 1932), chs. V and VI.

stitute an *in terrorem* deterrent to the exercise by workers and their labor organizations of their rights.

13. The proceedings were conducted in an atmosphere of strong feeling and prejudice which seriously jeopardized the detachment and objectivity which ought to prevail in a courtroom and to inform a legal proceeding.

14. All of the evils listed above were not peculiar to proceedings involving private employers. They were prominently identified with cases in which the executive resorted to the injunctive remedy.

Virtually every unwholesome aspect of the injunctive process described above was duplicated in the instant proceeding. Thus, upon a questionable equity basis an injunction was sought by the Government. It was sought allegedly as ancillary to a legal proceeding. It was issued without notice or hearing and upon the basis of affidavits. It forbade striking and an exercise by workers and their leaders of rights guaranteed by the Constitution.

The contempt punishments were imposed by the same judge who issued the restraining order. Enormous and arbitrary fines were levied because of asserted civil and criminal contempts. However, no effort was made to allocate the fines to the manner and extent of the contempt or to apportion the fines as between the alleged criminal and civil contempts. The proceedings were conducted in an atmosphere of strong feeling which the judge fully shared. His conduct of the trial betrayed a bias which in many respects is an exaggerated counterpart of the attitude displayed by American judges during the days in which the accretion of the injunction evil assumed a pattern to which the Clayton and Norris-LaGuardia Acts were directed.

The evils of "government by injunction" were dramatized by cases in which the Government itself played an outstanding part as plaintiff.[2] In those cases in which the Government

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[2] The best summary of the role of the Department of Justice in labor injunctions appears in Cummings and McFarland, FEDERAL JUSTICE (New York, 1937), pp. 462-463. See also Chafee, THE INQUIRING MIND (New York, 1928), pp. 198-216; Frankfurter and Greene, *op. cit.*; Berman, LABOR AND THE SHERMAN ACT (New York, 1930); Lindsey, THE PULLMAN STRIKE (Chicago, 1942), Chs. I, VIII, XII.

sought injunctions and in which equity relief was claimed because of some injury to the interests of the Government, the evils of "government by injunction" were reproduced in an exaggerated fashion.

The intervention of the Government made of the injunction an even more oppressive weapon. This was so because the normal demoralization consequent upon the intervention of the federal judiciary in labor disputes was emphasized when the executive took a hand as well. Frequently, these cases were conducted in at atmosphere of potential treason and disloyalty; the strikes involved were made to appear as insurrections against the sovereign. Frequently, the injunctions themselves were the prelude to the use of federal troops and to the threat of their use. Thus employers involved even in private disputes sought to clothe themselves with some form of governmental status which might serve as a basis for directing against the union of their employees the full repressive force of the Government itself.

Finally, the injunction was used more oppressively where the Government sought the injunction because the Government strategically picked that forum most sensitive to its position and most favorable to its legal theory.*

What we have been saying up to this point amounts to this: The entire history of the injunction evil is dominated by the role of the executive of the Federal Government in obtaining injunctions. The injunctions which the Federal Government obtained were more oppressive in character and dramatized the evils of injunctions in general.

The movement to eliminate injunctions as a weapon in industrial conflict was not merely a movement to deprive private employers of that weapon. So to view it would be to ignore the entire political character of the struggle against injunctions and would be to disregard some of the most bitter pages of our labor history.

It is our view that government activity in connection with

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*This abuse finds its most graphic illustration in the Wilkerson injunction obtained by Attorney General Daugherty in the *Railway Shopmen's* case, 283 Fed. 479, 286 Fed. 228, 290 Fed. 978. See Frankfurter, LAW AND POLITICS (New York, 1939), pp. 220-221.

labor disputes prior to the Clayton Act and the Norris-La-Guardia Act was of such a character as to make inescapable the conclusion that these Acts were intended to apply to the Government and that the abuse of equity jurisdiction which gave rise to these statutes was an abuse which the attorneys-general, the executive, had sponsored and popularized. The phrases "government by injunction" and "federal intervention in labor disputes" did not confine their objection merely to the role of the federal judiciary but included as well the role of the executive. The participation of the executive in the abuse which the Clayton and Norris-LaGuardia Acts sought to cure has a long genealogy of substance.

Injunctions at the instance of Government itself were used in labor matters from the beginning of the period when this weapon became prominent.

As early as 1892, two years after the passage of the Sherman Act, Attorney General Miller directed the District Attorney at New Orleans to institute a proceeding under the Sherman Act in connection with a draymen's strike in New Orleans. Just at the time when the draymen's union reached a compromise with the employers and the strike was being terminated, the District Attorney instituted suit against the Workmen's Amalgamated Council which was the organization conducting the strike. It was the hope of the District Attorney to secure an injunction which would prevent future strikes. His theory was that the organization remained a potential menace to interstate commerce even though the strike had long since been terminated. Three months later the injunction was granted, the judge holding that the mere termination of the strike was no basis for staying the hand of the court.[4]

This injunction was an outcrop of the movement by the Armies of the Commonweal in 1893 in their march on Washington. The marchers in the Commonweal armies created disturbances in connection with the railroad system. Many of the railroads affected were in bankruptcy and receivers had been appointed by the federal courts. Federal judges met this situation by issuing injunctions to protect the railroads from

[4] *U. S. v. Workers Amalgamated Council*, 54 Fed. 994 (1893), aff'd. 57 Fed. 85 (1893).

interference. The marshals named to enforce these orders appealed to Attorney General Olney who issued instructions that wherever necessary they should request military aid. They were also urged by Olney wherever possible to join with the federal judge and district attorney to obtain injunctions and to make their representation for troops where injunctions were violated. The procedure proposed was followed and regular soldiers were employed to put a stop to further violations of the injunctions.

In fourteen states the Department of Justice was called upon for aid to enforce injunctions and wherever necessary the assistance of federal troops was promptly invoked. The technique proved effective. Under the guise of enforcing court process federal troops could be sent to protect railroads in receivership. During the 90's this procedure was utilized with great frequency.

The receivership injunctions were granted upon the theory that the disturbances involved constituted an interference with the enforcement of the Interstate Commerce Act and with public rights.

Where railroad property was not in receivership, as in the Pullman strike, a new theory, that of political prerogative, was devised to meet the situation.*

The injunctive warfare during the Pullman strike of 1894 was not confined merely to the Debs injunction. The opening guns in the injunctive warfare were a series of receivership injunctions which were granted by federal judges.*

The Debs injunction was issued on July 2nd and differed from its predecessors primarily in its omnibus scope. It was promptly named the "omnibus" injunction. Of this injunction one writer has said:

> "For thoroughness and completeness, this writ left nothing to be desired. It was an ingenious weapon, whose terrible potentialities in the hands of a determined judi-

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* Accounts of the Commonweal movement and of the issuance of receivership injunctions to crush it appear in Cummings and McFarland, *op. cit.*, 439; Lindsey, *op. cit.*, 13-14; E. P. Oberholtzer, A HISTORY OF THE UNITED STATES SINCE THE CIVIL WAR (New York, 1937), Vol. V, 290-297.

* See Lindsey, *op. cit.*, 160-161.

ciary were soon revealed to the amazement and anger of labor."[7]

The New York Times[8] referred to it as a "Gatling gun on paper" and as a

> "veritable dragnet in the matter of legal verbiage, one of these peculiar instruments that punishes an individual for doing a certain thing, and is equally merciless if he does not do it, so it is difficult to understand how the strikers can maintain their present policy and at the same time evade its operation or escape its influence."

The New York World[9] said:

> "So outrageous a stretch of federal power was not attempted during the Civil War, when amid the tumult of arms laws were silent."

Lawyers were deeply troubled not merely by the rapid expansion of pre-existing injunction concepts, but also by the resort in the contempt proceeding to wholly new theories of equity jurisdiction. Thus, in a paper read before the American Bar Association, one student stated:[10]

> "The great 'Pullman boycott' and 'sympathy strike' of the American Railway Union have come and gone. The strike has passed into history, but what an intricate mass of juridical problems it has left behind it to be solved. Of these, none are more vital or more far-reaching in their consequences than those which envelop the court of equity.
>
> "The Attorney-General of the United States, acting for the United States in the exercise of its sovereignty as a nation, has sued out injunctions in nearly every large city west of the Alleghany Mountains.
>
> "Injunction writs have covered the sides of cars, deputy marshals and Federal soldiers have patrolled the yards of railway termini and chancery process has been executed by bullets and bayonets. Equity jurisdiction has passed from the theory of 'public rights' to the domain of political prerogative. In 1888, the basis of jurisdiction was the protection of the right of civil property; in 1893, it

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[7] Lindsey, *ibid.*, 162.

[8] July 5, 1894.

[9] July 4, 1894.

[10] Allen, "Injunctions and Organized Labor", 28 American Law Rev. 828.

was the preservation of public rights; in 1894, it has become the enforcement of political powers." [11]

This injunction, the use of troops which followed on its heels, and the subsequent contempt proceedings, constituted the most important single factor in the awakening of labor to the evils of government by injunction. It is fair to say that it was the Debs injunction which brought the American labor movement into politics. We find it impossible to believe that the Government now can seriously urge that restraints of the type made notorious by the *Debs* case are not reached by the Clayton Act and the Norris-LaGuardia Act.

Subsequent to the Debs injunction and prior to World War I the Department of Justice continued to seek and obtain injunctions in labor matters. See Berman, LABOR AND THE SHERMAN ACT, Appendix C.

The awareness that something must be done to prevent the Debs type of injunction was heightened by the injunction issued by Judge Anderson in the *Hayes* case[12] and by Judge Wilkerson in the *Railway Shopmen's* case.[13]

The Hayes injunction bears a strong underlying similarity to the situation involved in the instant case. In the middle of October of 1919 the United Mine Workers Union issued a strike call to the union miners in all the bituminous coal fields to take effect at midnight on October 31. Attorney General Palmer on October 31 started a suit in equity in the United States Court in Indiana and on the same day obtained from Judge Albert B. Anderson a restraining order against specified officers of the union commanding them among other requirements:

> "to desist and refrain from doing any further act whatsoever to bring about or continue in effect the . . . strike . . . ; from issuing any further strike orders . . .; from

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[11] Attacks on the Debs proceedings ranged from strictures upon the scope of the injunction (Gregory, 11 Harvard Law Review 487) to attacks upon the abuse of contempt process (Lewis, "A Protest Against Administering Criminal Law by Injunction—The Debs Case," 33 Am. Law Reg. (N.S.) 879).

[12] *U. S.* v. *Frank J. Hayes, et al.* (D. Ind. November Term, 1919) Equity 312, unreported.

[13] *U. S.* v. *Railway Employes Department*, 283 Fed. 479 (N.D. Ill.). See also, 286 Fed. 228 (N.D. Ill.) and 290 Fed. 978 (N.D. Ill.)

> issuing any messages of encouragement or exhortation to striking miners . . . to abstain from work and not to return to the mines . . .; and from . . . taking any steps to procure the . . . distribution . . . of . . . strike benefits, and from conspiring . . . with each other or any other person to limit the facilities for the production of coal, or to restrict the supply or distribution of coal. . . ."

The order, as the order involved in the instant case, prohibited the strike. After a hearing on November 8, the order was continued as a temporary injunction *pendente lite* with a mandatory provision for the recall of the strike before the end of the third day following. An order of the union officials for that purpose was subsequently approved by the court. This injunction, like the Debs injunction, elicited wide-spread criticism and contributed to the movement for a law eliminating injunctions from industrial disputes.

Finally, the 1922 Railway Shopmen's injunction served further to create a public atmosphere which favored closing the door of federal courts to seekers after injunctions, especially when such a seeker was the Attorney General.

Writing in *Collier's* magazine in 1922, Whiting Williams said:

> "The so-called Daugherty injunction has done more than anything else in a generation to arouse in the minds of hundreds of thousands of workers a growing doubt as to whether our Government can be trusted to play fair."

The entire struggle against the labor injunction was a struggle permanently to eliminate from the administration of justice in labor disputes the theories of Attorneys-General Olney,* Palmer and Daugherty.

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* To Olney, more than to any other single individual, we are indebted for the theory that "sovereignty" may be employed for strike-breaking purposes in injunctions. Olney was not content with his considerable successes prior to 1894 in connection with the receivership injunctions. He bequeathed to his successors the theory that the legal foundation for Government relief in a case of this sort is "the indisputable jurisdiction of a court of equity in the case of a public nuisance and its incontrovertible right to restrain the commission of such public nuisance when threatened and when such commission would work a public injury." Quoted from the Olney papers by Cummings and McFarland, *op. cit.*, p. 442. Alfred Russell, attorney for the Wabash Railroad, thus congratulated Olney: "To have suppressed a rebellion, to have practically opened a new development of the Principle of Equity . . . is glory enough for any one Attorney General." Quoted from the Olney papers by Lindsey, *op. cit.*, p. 324.

The war upon the labor injunction was more than a broadside attack upon an equity device which had been subverted for anti-social purposes. It was a conflict with a theory of government which in the minds of those who pressed for legislation embraced the resort to the federal executive power for the purpose of breaking national strikes. For it was in those strikes in which the most repressive orders were issued: it was in those strikes in which the injunctive evil found its strongest expression.

To suggest, as the Government does, that the Debs, Hayes, and Railway Shopmen's injunctions were intended to be left untouched by the Clayton and Norris-LaGuardia Acts is seriously to misread our social and economic history. These injunctions were employed for the bold and unconcealed purpose of smashing strikes. These injunctions were almost unique in that their impact was upon the act of striking itself in large national labor disputes.[11] The second paragraph of Section 20 of the Clayton Act and Section 4 of the Norris-LaGuardia Act prohibiting restraints upon the act of striking unmistakably owe their origin to these three strike-breaking injunctions. To assert today that these cases retain their vitality is to ignore the very essence of the anti-injunction struggle in this country.

B. The legislative history

The agitation in Congress for an alteration of the federal injunction policy was a constant and continuing one. The hearings before congressional committees are, as has been pointed out to this Court, studded with references to the activities of the Government itself in connection with the injunction evil.

It is worthy of note that the Committee Report accompanying the bill which became the Clayton Act specifically refers

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[11] "For almost a generation and a half, from the 1890's to the early 1930's, it may be said that the power of the courts was invoked to assist in defeating most of the important strikes—among them, the Pullman strike of 1894, the coal strike of 1919, the shopmen's strike of 1922—and only a smaller proportion of the relatively less important ones." Millis and Montgomery, ORGANIZED LABOR (New York, 1935), p. 631.

to the *Debs* case and the criticism which arose from it."[16] Likewise, the Minority Report states:

> "Among the acts which the second paragraph of section 266C declares shall not be restrained is to prohibit any person or persons to terminate any relation of employment, or from ceasing to perform any work or labor or from recommending or persuading others by peaceful means so to do; of peacefully persuading any person to work or to abstain from working, or from ceasing to patronize or employ any party to such dispute or from recommending, advising, or persuading others by peaceful means so to do; etc.
>
> "While many of these acts are in themselves entirely harmless and would never be enjoined by any court, yet under certain circumstances the same acts might become a weapon of lawless and destructive industrial warfare demanding the protection of the courts, this section would prevent the issuance of the injunction in the Debs case (In re Debs, 158 U. S. 564. . . .)" "[17]

The legislative history of the Norris-LaGuardia Act indicates, as the Mine Workers' brief shows, that Congress was determined to prevent the recurrence of such injunctions as the Debs injunction, the Hayes injunction and the Railway Shopmen's injunction. The rejection of the Beck and Blanton amendments plainly indicates a determination to this effect.

Similarly, the express provision in Section 10(h) of the National Labor Relations Act for amendment of the Norris-LaGuardia Act to remove limitations on federal equity jurisdiction for the purpose of enforcing Government orders in Labor Board cases conclusively shows that Congress believed that in the Norris-LaGuardia Act it had precluded the Government from obtaining injunctions in labor disputes.

Indeed, every attempt by Congress subsequent to the Norris-LaGuardia Act to legislate with reference to Government injunctions is marked by the same belief that in order to do so an amendment to the Norris-LaGuardia Act is required. As the Mine Workers' brief demonstrates, Congress flatly excluded resort to injunctions as a sanction for enforcement of the War Labor Disputes Act. Such an exclusion demon-

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[16] H. Rept. No. 612, 62d Cong., 2nd Sess., p. 28.

[17] *Ibid.*, pt. 2, p. 20.

strates not only a congressional recognition that the Norris-LaGuardia Act applies to Government-sought injunctions but also, more directly, it demonstrates that where there has been a seizure under the War Labor Disputes Act as here Congress intended that in the event of a violation of the Act of the type here involved a criminal prosecution and a criminal prosecution alone would lie. To urge that the court below could enjoin a violation of the War Labor Disputes Act, as does the Government, is to ignore the fact that the Constitution vests the war power in Congress and not in the courts.

As recently as May of this year the President in connection with the railroad crisis sponsored a bill (H. R. 6578) entitled: "An Act to provide on a temporary basis during the present period of emergency for the prompt settlement of industrial disputes vitally affecting the national economy in the transition from war to peace." This bill, which was drafted by the Department of Justice under the direction of the Attorney General, in effect constituted an extension of the War Labor Disputes Act. It provided that where a plant has been seized the President may by proclamation declaring an emergency fix wages.

Section 4 of the bill expressly provided, in part, that in the event of a strike in a property seized by the Government under the Selective Service Act, it is the obligation of those engaged in the strike to return to work.

The bill, in this connection, contained two significant changes in the terms of the War Labor Disputes Act. In the first place, it deleted the provision in the War Labor Disputes Act (contained in Section 6(a) thereof) which provides that "No individual shall be deemed to have violated the provisions of this section by reason only of his having ceased work or having refused to continue to work or to accept employment."

In the second place, the bill implemented the obligation to terminate a strike by a provision amending the Norris-LaGuardia Act. This provision (section 5 of H. R. 6578) provided as follows:

> "The Attorney General may petition any district court of the United States, in any State or in the District of Columbia, or the United States court of any Territory

> or possession, within the jurisdiction of which any party defendant to the proceeding resides, transacts business, or is found, for injunctive relief, and for appropriate temporary relief or restraining order, to secure compliance with section 4 hereof or with section 6 of the War Labor Disputes Act. Upon the filing of such petition, the court shall have all the power and jurisdiction of a court of equity, and such power and jurisdiction shall not be limited by the Act entitled 'An Act to amend the Judicial Code, to define and limit the jurisdiction of courts sitting in equity, and for other purposes,' approved March 23, 1932. Notice or process of the court under this section may be served in any judicial district, either personally or by leaving a copy thereof at the residence or principal office or place of business of the person to be served. Petitions filed hereunder shall be heard with all possible expedition. The judgment and decree of the court shall be subject to review by the appropriate circuit court of appeals (including the United States Court of Appeals for the District of Columbia) and by the Supreme Court of the United States upon writ of certiorari."

It seems plain that it was the Government's view prior to the instant proceeding that an injunction against striking in a seized plant would not lie without an amendment of the Norris-LaGuardia Act."

C. Theories of sovereignty or sovereign function could not give the court below jurisdiction.

The Government and the court below have drawn from the concept of sovereignty three arguments:

1. It is argued that the sovereign or the Government cannot be bound by legislation unless expressly named. Hence, the argument runs, the Norris-LaGuardia Act does not apply to the Government.

2. The contention is made that such cases as *U. S.* v. *American Federation of Musicians*" holding the Norris-LaGuardia Act applicable in cases in which the Government is the complainant do not control the instant situation because

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" One of the major grounds of objection to H. R. 6578 was precisely its amendment of the Norris-LaGuardia Act. See Congressional Record, Second Session, pp. 6169, 6170.

" 318 U. S. 741, aff'g. 47 F. Supp. 304 (N. D., Ill.).

these cases involve a dispute between private employers and their employees. The argument is made that we are here dealing with a sovereign function and that for this reason there is absent a "labor dispute necessary to call the Norris-LaGuardia Act into play." For, it is contended, "the sovereign in the exercise of its functions can at no time be held to be engaged in a labor dispute with private persons" (R. 57).

3. Finally, the contention is made that there is "a doctrine of long standing that the federal government is entitled to judicial protection of its rights lawfully to exercise its sovereign functions without interference and obstruction." In support of this statement the only cases cited are the *Debs*, *Hayes* and *Railway Shopmen's* injunction cases (R. 55).

We will consider each of these arguments in turn.

1. The court below held that the Norris-LaGuardia Act does not bind the Government because the Government is not expressly mentioned therein. The rule with respect to when a statute is to be read as applicable to the Government is of course merely a rule of statutory construction.[9] We do not think that formulas such as, "The king is not bound by any act of Parliament", or metaphysical elaborations of concepts of sovereignty can overcome either the solid history upon which our anti-injunction legislation rests or its unambiguous language.

The Norris-LaGuardia Act plainly states, "No court of the United States shall have jurisdiction . . ." etc. The prohibition in the Clayton Act is similarly unequivocal. Section 20 of that Act provides, "no restraining order or injunction shall be granted." As this Court has held:

> "Thou shalt not . . . is usually rendered as to forbid and we think here it was employed without subtlety or contortion and in its usual sense."[10]

Since the statute deals with subject matter and not with parties we would suppose that, even absent the statutory background, the United States could not be read out of the law. This is particularly true here, since the Clayton Act and the

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[9] See *Green* v. *U. S.*, 9 Wall. 655, 658.

[10] *Conn. Power & Electric Co.* v. *Federal Power Commission*, 324 U. S. 515, 532.

Norris-LaGuardia Act are express limitations on governmental power.[*] These Acts constitute limitations upon the authority of one of the branches of the Government, namely, the judiciary. It would hardly be reasonable to suggest that Congress flatly imposed uniform restraints upon the judiciary but that it intended to leave in the hands of the executive the power to nullify those restraints. Congress in the exercise of a power which is exclusive deprived the court below of jurisdiction. The executive branch cannot restore what Congress has taken away.

2. Moreover, if it is true that the United States is bound by the Norris-LaGuardia Act in cases involving labor disputes affecting private employers and their employees, then it cannot be true as the Government contends that the Norris-LaGuardia Act does not apply to the United States for reasons of statutory construction. The United States is or is not bound by the Norris-LaGuardia Act. If it is bound by the Norris-LaGuardia Act as the cases hold and as the Government has conceded in its brief in *United Brotherhood of Carpenters and Joiners* v. *U. S.*, Nos. 9, 10, 11, 12 and 13, this Term, page 6, then the only basis for escaping the reaches of the statute is the fact that there is no labor dispute here.

Manifestly, however, a dogma that the "sovereign" cannot be held to be engaged in a labor dispute with private persons does not answer our problem. Our problem is conclusively answered by the Norris-LaGuardia Act which defines "labor dispute" in Section 13(c) to include "any controversy concerning terms or conditions of employment . . . regardless of whether or not the disputants stand in approximate relation of employer and employee."

It would be an imposition on this Court to argue that what is involved here is a labor dispute squarely within that definition. Indeed, it seems clear this case not only "involves" a labor dispute between the government and the miners but also "grows out of" a labor dispute between the miners and the mine operators. What is vital here, however, is that ap-

[*] If there were in addition a privately administered court system in this country then an issue might arise as to whether the term "No court" excludes the Federal courts.

plicability of the Norris-LaGuardia Act does not turn upon the status of the parties to a dispute but merely on the existence of the dispute.

In the preamble to the Act, Congress charted the area in which the disputes which it sought to immunize from injunctive action might arise. The contest in which this dispute arose falls well within the area contemplated by the Norris-LaGuardia Act.

The miners involved in this dispute are of course employees. They are not employees of the Government. They are employees of the mine owners who continue to derive profit from the labor of the miners. Moreover, we are dealing here with employees of corporate and organized employers who are seeking to engage in the concerted activities characteristic of those activities for the protection of which the Norris-LaGuardia Act was passed. Sec. 2, Norris-LaGuardia Act. The Government does not nor could it contend that the miners by virtue of the seizure lost their right to protection of the National Labor Relations Act. It is submitted that the National Labor Relations Act must be read in *pari materia* with the Norris-LaGuardia Act. They are integrated parts of a single federal policy. These Acts together provide a code to safeguard the freedom of association, freedom of self-organization and freedom to engage in concerted activity for the purpose of collective bargaining or other mutual aid or protection of workers subject to federal jurisdiction."

The War Labor Disputes Act, pursuant to which the seizure was made, expressly provides that the definitions of the various basic terms in that Act are to have the same meaning as in Section 2 of the National Labor Relations Act. Section 7(a)(2) of the War Labor Disputes Act expressly provides that the National War Labor Board (later the Wage Stabilization Board) is to decide disputes in accordance with the provisions of the National Labor Relations Act.

Congress in the War Labor Disputes Act did not intend to withdraw from employees in seized enterprises the benefits of

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"Compare Sections 2 and 3 of Norris-LaGuardia Act with National Labor Relations Act. See also *Republic Steel Corp.* v. *N.L.R.B.*, 107 F. (2d) 472, 479 (C.C.A. 3).

the federal labor policy. They were to enjoy the same rights as they had enjoyed prior to seizure. This precise issue was recently passed upon by two Federal Circuit Courts of Appeal. In *Glen Alden Coal Co.* v. *National Labor Relations Board* 141 F.(2d) 47 (C.C.A. 3), a seizure under the War Labor Disputes Act was advanced as a defense to non-compliance with a National Labor Relations Board order. In rejecting this defense the court held:[a]

> "The President of the United States, acting pursuant to authority vested in him by the Constitution and laws of the United States, in particular the War Labor Disputes Act,[c] by the Executive Order of November 1, 1943, No. 9393, authorized and directed the Secretary of the Interior '. . . to take immediate possession, so far as may be necessary or desirable, of any and all mines producing coal in which a strike or stoppage has occurred or is threatened, . . . and to operate or arrange for the operation of such mines in such manner as he deems necessary for the successful prosecution of the war, and to do all things necessary for or incidental to the production, sale, and distribution of coal.'
>
> "The Executive Order goes on to provide, 'The Secretary of the Interior is authorized and directed to maintain customary working conditions in the mines and customary procedure for the adjustment of workers' grievances. He shall recognize the right of the workers to continue their membership in any labor organization, *to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection,*[d] provided that such concerted activities do not interfere with the operation of the mines.
>
> " 'The Secretary of the Interior is further authorized and directed to offer to the duly constituted representatives of the workers' own choosing a contract or contracts governing the terms and conditions of employment for the period of the operations of the mines by the govern-

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[a] The footnotes in the quotation which follows are the court's.

[c] War Labor Disputes Act, c. 144, Public Law 89, 1st Sess. 78th Congress, 50 U.S.C.A. Appendix, s. 1501 et seq. See United States Code Congressional Service, 1943, No. 4, 162 et seq.

[d] It will be observed that the words which we have italicized are identical with those of Section 7 of the National Labor Relations Act, 29 U.S.C.A. s. 157.

ment, in accordance with the opinion of the National War Labor Board in the matter of *Illinois Coal Operators Association* and *United Mine Workers of America* of October 26, 1943, and with such further directives as may be given by the War Labor Board. When any such contract has been agreed upon, the Secretary of the Interior shall apply under section 5 of the War Labor Disputes Act to the National War Labor Board for the approval of such contract and such changes in the terms and conditions of employment as may be authorized therein."

"On November 1, 1943, the Secretary of the Interior took possession of the coal mines, including the properties of Glen Alden, by virtue of the authority vested in him by the President of the United States by the Executive Order of November 1, 1943. Upon November 2, 1943, the Secretary of the Interior issued a directive designating the presidents of the respective mining companies as 'Operating Manager for the United States' for each and all of the mines. The directive states, inter alia, 'The Regulations for the Operation of Coal Mines Under Government Control, as amended (8 F. R. 6655, . . .) which I have issued heretofore, will be applicable to the present period of Government possession, and operation of your mines should be conducted in accordance with the provisions of those Regulations.' The Regulations for the Operation of Coal Mines Under Government Control promulgated by the Secretary of the Interior at 8 F. R. 6655 are particularly pertinent." Section 24 expressly

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[4] See United States Code Congressional Service, 1943, No. 7, 5-90 et seq.

[5] These Regulations provide in part as follows:

" 'Section 23 (b). *Collective bargaining.*—In accordance with the terms of Executive Order No. 9340, the customary machinery for the adjustment of workers' grievances shall be maintained in all mines and the right of the workers shall be recognized to continue their membership in any labor organization, to bargain collectively through representatives of their own choosing, and to engage in collective activities for the purpose of collective bargaining or other mutual aid or protection, provided that such concerted activities do not interfere with the operation of the mine.'

"Section 24 provides:

" 'Application of Federal and State Laws. (a) The mining companies, their personnel and their property are deemed to remain subject during the period of Government control to all Federal and State laws and to actions, orders, and proceedings of all Federal and State courts and administrative agencies. The companies are expected to meet all Federal, State and local taxes,

provides that all Federal as well as all State laws are to remain applicable to the mining companies, their personnel and their properties, as well as the actions, orders and proceedings of the Federal and State courts and administrative agencies. It is clear that the workers employed by the mining companies possess the right to bargain collectively and to engage in collective activities provided that these do not interfere with the operation of the mine. Note the provisions of the Executive Order of November 1, 1943, which we have italicized.' It is incumbent upon the Secretary of the Interior to decide whether these concerted activities by the workers in the mines will interfere with operation. The determination of this issue lies within the sound administrative discretion of the Secretary of the Interior under the regulations which he himself has promulgated. It is pertinent to note, therefore, that on November 22, 1943, the Secretary of the Interior wrote to Chairman Millis of the National Labor Relations Board in response to a letter written by Chairman Millis to him in respect to the proceedings now pending before us. Chairman Millis had directed his inquiry to the specific questions as to whether Glen Alden still possesses the right or duty to comply with the order of the controversy.' Secretary Ickes, quoting the regu-

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contributions, and assessments in the customary manner.'

"Section 17 of the Regulations provides that Operating Managers shall perform for their companies ordinary duties of management in accordance with established policies and practices so far as consistent with the regulations and instructions of the Administrator."

'" Secretary Ickes in his letter stated in part:

" 'In your [Chairman Millis'] letter of November 18 you state that in proceedings now pending before the United States Circuit Court of Appeals for the Third Circuit to enforce an order of your Board requiring the company to bargain collectively with the certified union at its Exeter shop, Glen Alden Coal Company has requested a stay of enforcement on the ground that while the property is in the possession of the Government, the Government has no power or authority to comply with the order of the National Labor Relations Board and the Board has no jurisdiction over the matter. You request a statement as to my position with respect to the company's request.'

"Referring then to sections of Regulations which we have quoted, Secretary Ickes states:

"Accordingly, despite the fact that the Government has taken possession of the mining properties, Glen Alden Coal Company remains subject to the orders of the National Labor Relations Board. I have at no time indicated that I would have any objection to compliance by the company or the Operating Manager with the Board's order.' "

lations heretofore quoted or referred to in this opinion, stated that despite the fact that the Government had taken possession of the mining properties, Glen Alden Coal Company remained subject to the orders of the National Labor Relations Board. This is a determination by the Administrator of the extent to which he has exercised the power conferred upon him by the President. Under the circumstances of the case at bar this determination is binding upon us.'

"A decree will be entered enforcing the order of the Board."

Accord: *National Labor Relations Board* v. *West Kentucky Coal Company*, 152 F. (2d) 198 (C.C.A. 6).

If seizure under the War Labor Disputes Act does not strip employees of the protection of the National Labor Relations Act in connection with their concerted activities what basis is there for giving seizure a different legal consequence in connection with the Norris-LaGuardia Act?

It seems to us that it cannot be disputed that there is here involved a labor dispute in the normal usual sense. It seems equally clear that the system of labor relations protected by the Norris-LaGuardia Act and the National Labor Relations Act is the system contemplated by Congress for employees in seized plants.

We are not here confronted with the situation in which employees not covered by the National Labor Relations Act,

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"We point out that the facts presented to the Supreme Court in the case of *Missouri Pacific R. Co.* v. *Ault*, 256 U. S. 554, 557, 41 S. Ct. 593, 595, 65 L. Ed. 1087, cited by Glen Alden, are in no wise analogous to those of the case at bar. As Mr. Justice Brandeis stated: 'By the establishment of the Railroad Administration and subsequent orders of the Director General, the carrier companies were completely separated from the control and management of their systems. Managing officials were "required to sever their relations with the particular companies and to become exclusive representatives of the United States Railroad Administration". . . . The railroad employees were under its direction and were in no way controlled by their former employers.' In the case of the mines, the right of the workers to bargain collectively through representatives of their own choosing specifically has been preserved and the Operating Managers are empowered to serve as agents of their companies. '. . . with respect to all actions which they would have been empowered to take on behalf of . . . [those companies] in the absence of Government control of . . . [their] properties.'"

such as government employees, claim the protection of the Norris-LaGuardia Act. Such circumstances would bring into play the comments of Congressmen LaGuardia and Michener upon which the Government mistakenly relies in this case. The relationship in the instant proceeding between the Government and the employees involved, insofar as the employment relationship is concerned, does not differ materially from that presented by the landmark cases, such as *Debs* and *Railway Shopmen*, to which the Norris-LaGuardia Act was addressed.

3. The Government seeks to draw from the fact of sovereignty an argument to support the jurisdiction of the court below but, as already noted, it relies on the very cases the force of which it was the purpose of the Clayton and Norris-LaGuardia Acts to destroy.

Moreover, insofar as it is urged that these cases confer equity jurisdiction on the court, such a contention is plainly erroneous. The mere fact of interference with a Government function does not in and of itself confer equity jurisdiction. The interest which is invaded must be an interest of equitable cognizance. In the *Debs* case, equity jurisdiction was found through those cases permitting the injunctive elimination of a public nuisance. It was held that the obstruction of a highway and physical interference with commerce legitimately called into play the powers of equity. In the present case no contention can be made that there had been or threatened to be physical obstruction to federal property justifying the intervention of a court of equity.

In the *Hayes* case, federal equity jurisdiction was grounded on an alleged violation of the Lever Act, a statute of 1917 to punish conspiracies to restrict the production and distribution of necessaries. In criticism of the injunction issued upon this basis by Judge Anderson in the *Hayes* case, Professor Chafee has this to say:

> "If there is one principle of equity which can be regarded as settled, it is that a crime will not be enjoined merely because it is a crime. Some other aspect of the defendant's conduct must bring the case within the established jurisdiction of chancery. The Lever Act declares violations thereof to be crimes subject to criminal penal-

ties. Not a clause makes them a ground for equitable relief.

"Consequently, the coal-strike injunction can be supported only if it was based upon the infringement of a definite federal right. The existence of such a right must remain conjectural in the absence of any written opinion from the United States District Court of Indiana. Over a century has elapsed since the greatest of chancellers declared, 'I have no jurisdiction to prevent the commission of crimes.' A conservative lawyer of today may be permitted to share Lord Eldon's doubts, and express regret that Judge Albert B. Anderson felt unable to make public the reasons which led him to differ from the foremost English advocate of law and order, who even during the disturbance of the French Revolution refused in the absence of legislative authority to strengthen the power of the government by placing the Court of Chancery at the disposal of the criminal law." *

Those strictures apply even more strongly to the instant case in view of the legislative history of the War Labor Disputes Act demonstrating the rejection by Congress of the injunctive sanction.

Finally, the Wilkerson injunction in the *Railway Shopmen's* case rests upon a jurisdictional basis wholly analogous to the *Debs* case, namely, physical interference with interstate commerce and the mails. Even if these grounds had validity today they would furnish no basis for the restraining order here involved.

It is thus apparent that the mere fact that the Government is the complainant did not serve to confer jurisdiction on the court below. The complainant did not and does not occupy such a relationship to the employees here involved as would make inappropriate to their status the rights and protections of the federal labor policy. Moreover, the status of the complainant is not different for purposes of this case than any other case in which the Government pursuant to the Constitution and laws of the United States seeks to exercise a duty.

The fact that the Government has seized the property involved herein did not endow it with a prerogative which it

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* See Chafee, "The Progress of the Law, 1919-1920," 34 Harvard Law Review 405.

lacked when the Government sued to enjoin conspiracies in restraint of commerce and was held to be barred from doing so by the Norris-LaGuardia Act.

Finally, even if the Norris-LaGuardia Act were inapplicable, the mere fact that the complainant was here the Government did not create a basis of equitable relief.

• • •

From the very beginning of the injunctive evil an attempt was made by those engaged in disputes with their employees to acquire a governmental or quasi-governmental status. The receivership injunctions rested upon the peculiar status of the receiver as an officer of the court. The long strife in the coal fields during the first quarter of this century was accompanied by a bitter and persistent attempt on the part of the coal operators to clothe their operations with some sort of government status so that strikes would create a basis for the calling forth of federal troops. A related attempt to use the concept of government or sovereignty to attack workers followed from the efforts of individuals who had secured injunctions to obtain enforcement by the Department of Justice. The theory of these requests was that "It had been the traditional function of the federal executive law officers to protect and enforce orders, decrees, judgments and process of the federal courts. Private litigants were thus relieved of responsibility and expense, and the impression was created that the government was on their side." [*]

Also integral to this entire process of obtaining state sanctions in labor relations was the historic pressure upon the Department of Justice to cooperate with federal judges issuing injunctions in criminal contempt proceedings conducted in the name of the United States.

Finally, as Cummings and McFarland point out, during the last war, "there were instances in which federal judges recognized a peculiar wartime relation between the businesses affected by labor controversies and the government itself." [*] In *Wagner Electric Manufacturing Co.* v. *District Lodge*, 252 Fed. 597 (1918), a strike to compel a company to abandon

[*] See Cummings and McFarland, *op. cit.*, 445.

[*] *Ibid.*, 453-454.

the open shop was enjoined because the company was, as the court held, "to all intents and purposes an instrumentality or agency of the government itself, created and existing under national laws." The judge, therefore, directed the marshal to appoint deputies to enforce the injunction, and the Department of Justice cooperated to the extent of authorizing the appointments.[*]

This brief summary of attempts to utilize the power of the state in order to impose repression in labor matters is not given here to challenge the good faith of the Government's seizure of the coal mines. It is given rather to indicate that while the exact relationship of the Government to the coal miners may not perhaps be precisely reproduced in other eras of our injunctive history prior to the Norris-LaGuardia Act, nevertheless relationships quite similar to that here involved were woven into the fabric of the injunction evil. We seek to point out to the Court that the labor history giving rise to the Norris-LaGuardia Act reflects not only those situations where the Government asserted its own sovereignty and sovereign rights as a basis for obtaining an injunction in its own quarrels but also those in which others were permitted to assert that sovereignty in their quarrels with workers.

Indiscriminate resort to such terms as "sovereignty" is rarely helpful in construing legal rights and relationships under our constitutional system of government and under our political traditions. We remain a government of limited powers. Nor have we ever embraced a theory which endows the state with a life independent of the people. But resort to sovereignty concepts is particularly treacherous in the field of labor relations where such concepts have historically served a questionable role.

II. THE RESTRAINING ORDER VIOLATES THE CONSTITUTION

The entire record in this case is pervaded with what can only be called a callous disregard of the procedural and constitutional rights of the defendants below. Proceedings of the

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[*] *Ibid.*

type here under review have historically raised grave constitutional questions. The court below seemed content to gloss over the problems presented by the Constitution on the basis of its own personal assurance that whatever unconstitutional implications were present in the order were being misconstrued since the court had no intention of giving the injunction an undue scope.

However, the court apparently was unaware or refused to recognize that the order was addressed to the following classes of persons

1. the defendants,
2. their agents and servants,
3. their employees and agents,
4. *all persons in active concert or participation with them* (italics ours).

These groups of persons were restrained:

(1) "from permitting to continue in effect the notice heretofore given by the defendant, John L. Lewis, to the Secretary of the Interior dated November 15, 1946."

(2) "from issuing or otherwise giving publicity to any notice that was to the effect that the Krug-Lewis agreement has been, is, or will at some future date be terminated, or that said agreement is or shall at some future date be nugatory or void at any time during the Government's possession of the bituminous coal mines."

(3) "from breaching any of their obligations under said Krug-Lewis agreement."

(4) "from coercing, instigating, inducing or encouraging the mine workers at the bituminous coal mines in the Government's possession, or any of them, or any person, to interfere by strike, slow down, walkout, cessation of work, or otherwise, with the operation of said mines by continuing in effect the aforesaid notice or by issuing any notice of termination of agreement or through *any other means or device.*" (italics ours)

(5) "from interfering with or obstructing the exercise by the Secretary of the Interior of his functions under Executive Order No. 9728."

(6) "and from taking any action which would interfere with this court's jurisdiction or which would impair, obstruct or render fruitless the determination of this case by the court."

It is our view that these restraints are repugnant to the First and Thirteenth Amendments to the Constitution.

Under Section 2 of this order it would be impossible for the union or its members to present in any effective fashion their views with respect to the validity of the Krug-Lewis agreement. The order forces the defendants to accept a legal theory which they now dispute. But it does more than that, the defendants are enjoined by the order from disputing it.

Despite the fact that the order plainly would require individuals to work if by not doing so they encouraged others to refrain from working, the court refused even to entertain an objection that this constituted involuntary servitude. It contented itself with the assertion that the miners were not involved in the case and that it would not have directed contempt sanctions against them had they refused to work (R. 178). The Constitution deals with realities." The basic reality underlying the restraining order is that some sanction beyond that laid down in the War Labor Disputes Act was necessary to compel the employees here involved to work in the mines. The Government went to the court below to obtain that sanction. To contend seriously that the right to quit work was not involved in this case is to ignore the very essence of the proceeding. It seems to us that the order cannot possibly be viewed other than as an attempt to make men work against their will.

A strike is not merely an abstract refusal to work. It is part of a complex of related activities. These activities include meetings of workers to clarify the objectives of the strike, newspaper and radio campaigns in explanation of the issues, the distribution of leaflets and other activities whereby a strike is made effective. Since the order condemns the strike it unquestionably condemns and suppresses these activities which are integral to the strike. It places upon thousands of workers a blackout of freedom of an unbelievable kind. They are not merely forced to work. They are forced to remain silent and to refrain from those constitutionally protected activities which are traditionally associated with and indispensable to a strike. *Thornhill* v. *Alabama*, 310 U. S. 88.

" *Gompers* v. *United States*, 233 U. S. 604, 610.

The order is offensive, moreover, because it requires those against whom it operates to rescind the notice terminating the Krug-Lewis agreement. The Government recognizes that this notice was in effect a strike call. The order thus forces the individuals and groups against whom it operates to tell employees to take action which the speakers themselves may be convinced is not merely wrong but against the best interests of the union. In this aspect the order presents the same obnoxious features as any oath requirement or declaration of loyalty. It punishes a union leader if he fails to solicit a course of action which he deems to be detrimental to the interests of the union. The order compels the duly elected representative of a voluntary unincorporated association to violate his oath of office. It tells him to act as a strike-breaker; to do that which he may deem fatal to the best interests of the organization which he is charged with leading and protecting. If any type of compulsion is more obnoxious to all that is held dear in a democratic society we do not know what it is. Compare *Barnette* v. *West Virginia*, 319 U. S. 624.

III. THE RESTRAINING ORDER COULD BE DISREGARDED WITH IMPUNITY

It is the view of the Government and the court below that even if the Norris-LaGuardia Act applies, the court below had inherent jurisdiction to preserve the *status quo* pending its determination of the jurisdictional question.

Wholly apart from the consideration peculiar to the subject matter of the statute which defeat such a contention (see *infra*), the language of the statute precludes this contention. Section 4 of the Norris-LaGuardia Act plainly says, "*No* court of the United States shall have jurisdiction to issue *any* restraining order" to prohibit the doing of those very acts which the court below prohibited. Congress did not say that a court might issue those prohibitions in order to maintain the *status quo* pending a determination of the jurisdictional question. The statutory withdrawal of power is plain and unequivocal.

The reason for the outright prohibition is not hard to find. The *status quo* in labor relations is too perishable to be pre-

served even for ten days. A labor dispute is a highly dynamic phenomenon and even a short delay can irreparably alter the relationship of the parties and the capacity of a union to effectively avail itself of the economic weapons at its disposal. The destructive effect of even a temporary restraint upon the rights of workers and the manner in which the law's delays were deliberately exploited by employers was familiar to the framers of the Norris-LaGuardia Act and to other students of the problem.

> "A large majority of injunction proceedings are never carried beyond a restraining order or temporary injunction and, therefore, are unlikely ever to reach the state of official reporting which is concerned largely with final decrees and with decisions of appellate courts." [8]
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> "Moreover, the suspension of strike activities, even temporarily, may defeat the strike for all practical purposes and foredoom its resumption, even if the injunction is later lifted." [9]
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> "Injunctions are often applied for and issued for the moral effect that such injunctions will have in disheartening and discouraging employees engaged in a strike, rather than because of any real necessity to protect property." [10]
>
> "The lawyer who finds that an erroneously granted injunction against picketing has been reversed by the appellate court will probably feel that justice has been attained. The unionist only sees that the strike was effectively broken by the erroneous injunction; the reversal comes months too late to reinstate the contest." [11]
>
> "In labor cases, however, complicating factors enter. The injunction cannot preserve the so-called *status quo;* the situation does not remain in equilibrium awaiting judgment upon full knowledge. The suspension of activities affects only the strikers; the employer resumes his efforts to defeat the strike and resumes them free from the interdicted interferences. Moreover, the suspension of strike activities, even temporarily may defeat the strike for practical purposes, and foredoom its resumption, even if the injunction is later lifted." [12]

[8] See S. Rept. 1060, 71st Cong. 2d Sess., part 2, p. 7.
[9] *Ibid*, p. 201.
[10] *Ibid*, p. 20.
[11] See Chafee, THE INQUIRING MIND (N. Y., 1928), p. 188.
[12] See Frankfurter and Greene, THE LABOR INJUNCTION, p. 201.

"In the complaints, it is customary to ask for a temporary restraining order prohibiting the defendants from doing any of the acts complained of until the case can be heard. The issuance of such orders is entirely discretionary with the court but in non-labor cases is very much a matter of course, their professed purpose being to preserve the *status quo* until the merits of the dispute can be determined.

"While there has been little objection to the issuance of temporary restraining orders in non-labor cases, no feature of the use of injunctions in labor disputes has aroused more adverse criticism. The fundamental reason for this is that labor disputes are dynamic occurrences, and there is no possibility of merely preserving the *status quo*. Strikes are usually won or lost within a few days, so that, for practical purposes, the temporary restraining order is the most important of all injunctive writs in labor cases. This was clearly, although moderately, stated by the late President and Chief Justice Taft:

> 'The temporary restraining order is served upon all strikers; they are not lawyers; their fears are aroused by the process with which they are not acquainted, and, although their purpose may have been entirely lawful, their common determination to carry through the strike is weakened by an order which they have never had an opportunity to question, and which is calculated to discourage proceeding in their original purpose.' "[*]

The theory of the court below that it retained jurisdiction despite the prohibitions of the Norris-LaGuardia Act is typical of the formulations which made an empty promise of the Clayton Act. If validated here, it can easily result in a judicial nullification of the Norris-LaGuardia Act.

CONCLUSION

In commenting on the fate of the Clayton Act in the courts, two students of the problem of the labor injunction say, "The result justifies an application of a familiar bit of French

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[*] Witte, THE GOVERNMENT IN LABOR DISPUTES (N. Y., 1932), pp. 89-90.

cynicism; the more things are legislatively changed, the more they remain the same judicially."

Since those words were written, things have again been changed legislatively by the Norris-LaGuardia Act. We are confident that this Court will not agree with the court below that they remain the same judicially.

Respectfully submitted,

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" Frankfurter and Greene, THE LABOR INJUNCTION (N. Y. 1930), p. 176.